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11 **UNITED STATES BANKRUPTCY COURT**
12 **EASTERN DISTRICT OF WASHINGTON**

13 In re:

14 **THE CATHOLIC BISHOP OF**
15 **SPOKANE a/k/a THE CATHOLIC**
DIOCESE OF SPOKANE

16 Debtor.

Case No.: 04-08822-PCW11

Chapter 11

COMMITTEE OF TORT
LITIGANTS' OBJECTION TO
DEBTOR'S MOTION FOR
APPROVAL OF SETTLEMENT
AGREEMENT AND RELEASE
WITH GENERAL INSURANCE
COMPANY OF AMERICA
(Docket No. 1279)

19 I.

20 **OBJECTION**

21
22 The Committee of Tort Litigants (the "Tort Litigant Committee") in the above-
23 referenced chapter 11 bankruptcy proceeding of the Catholic Diocese of Spokane (the
24 "Debtor or "Diocese") hereby objects as set forth herein to the Debtor's Motion to
25 Approve Settlement Agreement and Release with General Insurance Company of
26 America, Including the Sale of Insurance Policies Free and Clear of Liens, Claims,
27 Encumbrances and Other Interests (the "Motion")¹ because (1) the record is

28 ¹ The Committee of Tort Litigants utilizes the same definitions as contained in the Motion unless
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1 inadequate to support approval of the proposed Settlement Agreement and Release
2 (the "Settlement Agreement"); and (2) the proposed Settlement Agreement with
3 General Insurance Company of America ("GENERAL") and the proposed orders²
4 approving the Settlement Agreement as currently drafted contain provisions that may
5 be either illegal, unenforceable or both. In support of its objection, the Committee of
6 Tort Litigants states as follows:

7 1. The Settlement Agreement covers fourteen consecutive years of liability
8 coverage provided by GENERAL, from 1958 – 1972. It appears from the Diocese's
9 documents that GENERAL had a potential exposure of \$200,000 per claim with a
10 maximum exposure of \$2 million per year (for most or all years)³. In other words, the
11 Diocese is settling GENERAL's potential maximum exposure of \$28 million
12 (fourteen years multiplied by the yearly \$ 2 million cap). GENERAL had already
13 paid \$1.36 million in connection with its defense and indemnity obligations under
14 these policies. GENERAL is now agreeing in the Settlement Agreement to pay \$5.25

15
16 otherwise indicated.

17 ² Unless otherwise noted, this Objection is directed to the "Order Approving Settlement and Release
18 With General Insurance Company of America, Including the Sale of Insurance Policies Free and
19 Clear of Liens, Encumbrances and Other Interests" (hereinafter the "Proposed Order").
20 Nevertheless, this Objection also encompasses the "(Proposed) Order Approving Settlement, Barring
21 Claims Against General Insurance Company and Safeco Insurance Company of America, and
22 Dismissing Complaint and Crossclaims Against General Insurance Company of America and Safeco
23 Insurance Company of America" (hereinafter the "Bar Order"), which is Exhibit A to the Settlement
24 Agreement and to be entered in the District Court, in the Coverage Action. The Bar Order suffers
25 from the same infirmities as the Proposed Order, and to the extent that this Court is being asked to
26 approve the Settlement Agreement, which includes Exhibit A, the Bar Order, this Objection is also
27 directed to the Bar Order as well as the Proposed Order.

28 ³ GENERAL has apparently taken the position that all exposure to abuse by priests constitute a
single "occurrence" under all of its fourteen policies such that its complete potential exposure is a
single year limit of \$2 million, less the \$1.36 it has already paid out, or more precisely \$640,000.
The Motion does not begin to analyze the weakness of this argument. While this pleading is not the
place to engage in extensive coverage analysis, case law consistently rejects GENERAL's position.
See, e.g., Society of the Roman Catholic Church of the Diocese of Lafayette and Lake Charles, Inc.
v. Interstate Fire & Cas. Co., 26 F.3d 1359 (5th Cir. 1994) (molestation of different children
constitutes separate occurrences) (and cases cited therein).

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1 million to "buy back" its fourteen policies. Apparently the Diocese has spent more
2 than \$1 million in litigation coverage disputes with its carriers. GENERAL's fourteen
3 years of policies issued to the Diocese constituted approximately half of the years
4 implicated in the coverage disputes.

5 2. The Motion is supported by the declarations of Shaun Cross and James
6 Murray, attorneys for the Diocese. Mr. Cross's declaration is submitted to
7 demonstrate that he "believe[s] the compromise reflected in the Settlement Agreement
8 is fair, and the Diocese's decision to enter the Settlement Agreement is an appropriate
9 and advisable exercise of the Diocese's business judgment." Paragraph 6.

10 3. To support this opinion, he states several truisms concerning litigation,
11 without any application to the facts surrounding this settlement with GENERAL. For
12 example, he notes that litigation is "time consuming and costly", that the settlement
13 "strengthen[s]" the "Diocese's financial position and ability to pay Tort Claims", that
14 the settlement will avoid "complex and protracted litigation", that the Diocese's
15 "already limited funds" will not be "diminish[ed]", that "high level personnel of the
16 Diocese" can now attend to formulating a resolution to the Chapter 11 case, and that
17 the Diocese can now "concentrat[e] its litigation efforts on the non-settling insurers."
18 Acknowledging the complications and risks posed by the absence of a bar date and the
19 potential for claims to be asserted against the Diocese in the future, that presumably
20 will not be covered by GENERAL if the Settlement Agreement is approved, Cross
21 concludes: "Considering all the risks and factors, I believe the Settlement Agreement
22 represents a fair compromise of the Coverage Disputes." Cross also testifies that the
23 negotiations were at arms-length, devoid of fraud or collusion and were difficult and
24 time consuming. These unsurprising characteristics of the formation and drafting of
25 the Settlement Agreement do not make it reasonable or fair. Simply put, Mr. Cross's
26 declaration establishes no range of reasonableness, nor any basis upon which this
27 Court could conclude the Settlement Agreement was fair or reasonable or that the
28 Diocese exercised its business judgment in an advisable or appropriate manner.

1 Rather, many questions remain about why \$5.25 million is a justifiable settlement of
2 all insurance policy proceeds when, based upon policy terms, GENERAL has a
3 potential maximum exposure of \$28 million.

4 4. Murray's declaration, while equally superficial, is directed to the various
5 coverage issues raised by GENERAL. The merits in settling include "eliminat [ing]
6 the need to take or defend [] extensive discovery", "eliminat [ing] one of the principal
7 adverse litigants in the coverage action," and that the settlement "may well create
8 further momentum" for settlements with other insurers. But beside the standard
9 references to bringing money into the estate, and eliminating costly litigation, Murray
10 provides no analysis or reasoning why \$5.25 million is within a reasonable range of
11 settlement. Moreover, the Murray declaration indicates that the settlement was
12 negotiated prior to the ruling by Judge Quackenbush in the Coverage Action that:
13 "[T]he claims being brought against the Diocese allege negligence and there is no
14 doubt that acts of negligence can be accidental and constitute 'occurrences'".

15 Decision at 40. No explanation is provided as why the Coverage Action's opinion
16 denying summary judgment on certain coverage defenses would not have or did not
17 increase the settlement value of the Diocese's claim against GENERAL. This would
18 seem to be especially pertinent information since the settlement with GENERAL was
19 not executed by the Diocese until June 23rd, 2006.

20 5. To understand how Messrs. Cross and Murray arrived at the conclusions
21 they have testified to in support of the Motion, and probe the reasonableness and
22 fairness of the Settlement Agreement, it will be necessary to examine their
23 conclusions. See, e.g., Home Indemnity Co. v. Lane Powell Moss & Miller, 43 F.3d
24 1322 (9th Cir. 1995).

25 6. Even taking the unsupported conclusions of Cross and Murray into
26 account, the record is devoid of any information as to how the \$5.25 million
27 settlement amount compares to the maximum and minimum range of recoveries the
28 Diocese has concluded the victims within the fourteen years of GENERAL's coverage

1 could be entitled to. Without such information, the fairness or reasonableness of the
2 Settlement Agreement cannot be properly assessed.

3 7. There are other problems in assessing the fairness or reasonableness of
4 the settlement with GENERAL. The Settlement Agreement and the Proposed Order
5 are inconsistent in describing how the \$5.25 million settlement sum can be used. The
6 Settlement Agreement provides as follows: "Except as otherwise ordered by the
7 Bankruptcy Court after notice and hearing, the Debtor agrees that it shall use any and
8 all sums received hereunder solely toward payment for indemnity for Tort Claims."
9 Id. At Section B.3. The Proposed Order provides at paragraph 7, p.17, "The proceeds
10 of the sale of the General Policies shall be reserved for the benefit of holders of Tort
11 Claims. But the Proposed Order also provides that the Diocese and General "are each
12 hereby authorized to take all actions...necessary and/or appropriate to implement and
13 effectuate the transactions contemplated by the Settlement Agreement." Id. at
14 paragraph 5, p. 16. There are potential inconsistencies and potential confusion
15 regarding how the \$5.25 million can be used, making it impossible to understand the
16 reasonableness or fairness of the settlement when it is unclear to whom the proceeds
17 are to be paid and for what.

18 8. The Settlement Agreement provides at Section F, Paragraph 5: "The
19 Diocese...agrees to indemnify and hold any Released Party [GENERAL] harmless
20 from any liability, loss, claims, damages, demands, costs, expenses or attorneys fees
21 incurred by the Released Party [GENERAL] [as a result of][sic] any Releasing Party
22 asserting any interest in or coverage under any of the General Policies." The term
23 "Releasing Parties" is defined in Section C.1 as "The Debtor, on behalf of itself, and
24 all of its past, present and future employees, directors, officers, shareholders, agents,
25 representatives, attorneys, related entities, affiliates, parents, subsidiaries, divisions,
26 parishes, churches, cemeteries, schools and other institutions within or affiliated with
27 the Debtor, any predecessors, successors and assigns..."
28

1 9. At least some of the GENERAL policies identify as the "Named
2 Insured": "The Catholic Bishop of Spokane, a corporation sole and/or Bernard J.
3 Topel, Bishop of Spokane and/or priests individually and sisters individually and
4 schools, religious orders, societies and associations affiliated with the Catholic Bishop
5 of Spokane."

6 10. The fairness and reasonableness of the settlement with GENERAL
7 cannot be gauged since there exists the obvious potential for one of the name insureds
8 (e.g., a school or any association affiliated with the Catholic Bishop of Spokane) to
9 make a claim against GENERAL (somewhat like Morning Star Boys' Ranch), valid or
10 not. Whether or not the Morning Star objection is well taken, they are an example of
11 precisely the kind of claimant who rejects the notion that the Settlement Agreement
12 and the Proposed Order apply to them. If a claimant similar to Morning Star does
13 come forward, such action could potentially trigger the indemnity provision of the
14 Settlement Agreement, resulting in, at the very least, GENERAL making an
15 administrative claim for attorneys fees. This potential burden upon the estate not only
16 affects distributions to creditors, but might even affect the \$5.25 million settlement
17 sum which, according to the Proposed Order, can be utilized upon a Bankruptcy Court
18 order, presumably paying administrative claims ahead of unsecured creditor claims.

19 11. The same concerns arise from the definition of Tort Claims in Recital 1
20 to the Settlement Agreement, which defines them as follows: "'Tort Claims' shall
21 refer to any and all such claims or interests⁴, past, present or future, directly or
22 indirectly, including those for indemnity, contribution or otherwise, arising out of
23 such allegations and/or claims." *Id.* There exists the potential for other claimants who
24 are not victims asserting claims against the Diocese for sexual or physical abuse
25 (similarly situated to Morning Star Boys' Ranch) to share in the settlement proceeds
26

27 ⁴ The Claims referred to are defined in the same recital as: "various acts or omissions, including,
28 without limitation, those related to sexual and/or physical abuse committed by priests or other
personnel, for which those entities or individuals seek or may seek to hold the Debtor liable...."

1 simply because of the manner in which the Settlement Agreement defines Tort
2 Claims. To the extent that other claimants could or can diminish the settlement
3 proceeds available to the victims, the Settlement Agreement may not survive an 11.
4 U.S.C. § 363(e) challenge, as the victims would not have received the adequate
5 protection that section of the Bankruptcy Code requires.

6 12. The definition of Tort Claim also raises the possibility that any non
7 victim or survivor who is subject to a Tort Claim may have a claim to the \$5.25
8 million settlement amount. The ramifications include the potential that this fund
9 might not be able to be disbursed until all indemnity claims of third party defendants
10 are resolved and that the Diocese could use these funds to pay defense costs incurred
11 subsequently. Conversely, the Settlement Agreement provides that holders of Tort
12 Claims are not third party beneficiaries of the Settlement Agreement, even though the
13 Settlement Agreement purports to provide that the \$5.25 million be used "solely
14 toward payment for indemnity for Tort Claims." Section B.3 That inconsistency
15 would potentially deprive the holders of Tort Claims of standing to object to the use of
16 those funds.

17 13. The Settlement Agreement and Proposed Order also contain provisions
18 that may be illegal or unenforceable, or both.

19 14. As the Motion acknowledges (p. 25), there may be an issue as to whether
20 the sale of the GENERAL policies and the proposed "buy back" violates Section
21 48.18.320 of the Revised Code of Washington. See, e.g., American Continental Ins.
22 Co. v. Steen, 91 P.3d 864 (2004). It is the Diocese's position that the GENERAL
23 policies are not being voided, but "rather are fully performed, consistent with a
24 reasonable compromise resolution that accurately reflects the value of that
25 performance." Id. at 26. As noted above, the Motion does not provide evidence
26 sufficient to judge whether the Settlement Agreement is indeed a "reasonable
27 compromise" that "reflects the value of that performance."
28

1 15. There may also be an issue regarding the Bar Order. The Settlement
2 Agreement requires a Bar Order "forever barring all equitable contribution, indemnity,
3 subrogation and other claims by any entity, including, without limitation, any party to
4 the Coverage Litigation, in any way related to or arising out of the Tort Claims or the
5 General Policies...." Section E.2 The Proposed Order states that: The terms of the
6 Settlement Agreement and this Approval Order shall be binding upon the Diocese, the
7 FCR, all holders of Tort Claims, all parties that could now, or in the future assert
8 interests in the General Policies, and all other parties in interest and each of their
9 successors and assigns (including, without limitation, any trustee appointed under the
10 Bankruptcy Code). The Proposed Order also contemplates, as does the Settlement
11 Agreement, a channeling injunction in any plan of reorganization approved by the
12 Bankruptcy Court, that channels all claims filed against the Diocese, as well as
13 GENERAL and its affiliates, into a trust.

14 16. These provisions may violate case and statutory law. The proposed Bar
15 Order may constitute an impermissible permanent injunction enjoining non-debtor
16 third parties from bringing actions against other non-debtor third parties (*i.e.*,
17 forbidding creditors of the debtor from bringing actions against other creditors of the
18 debtor). See, e.g., In re American Hardwoods, 885 F.2d 621 (9th Cir. 1989). Such a
19 request may also be procedurally defective. See Fed. R. Bankr. P. 7001(7).


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1 17. The Committee for Tort Claimants reserves its right to raise further
2 objections and/or supplement this Objection as further information becomes available.

3 Dated: August 7, 2006

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